

In the Supreme Court of the United States

OCTOBER TERM, 1924

CHARLES SHERWIN AND HARRY H.

Schwarz, Petitioners

v.

THE UNITED STATES OF AMERICA

} No. 379

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

The petitioners were charged by indictment in the United States District Court for the Northern District of Texas with using the mails to defraud and upon trial were convicted of that crime. Briefly described, their offense consisted in disseminating letters and literature filled with false and fraudulent representations whereby many were induced to buy worthless interests in common-law trusts described by their promoters, these petitioners, as owning and engaged in developing valuable gas and oil properties in Texas. Having for a trifling sum per month employed a common

laborer of the name of Robert A. Lee, they gave his name to their concerns, widely advertised him as a great geologist, denominated him "General," held him out as a member of the famous American family of Lee, close kinsman of the illustrious Confederate Chieftain, and caused his name to be signed to all their letters and printed matter.

No question is now made as to the guilt of the petitioners and there has so far been no effort to minimize the infamy of their acts. The sole question before this court is whether they were entitled to immunity by reason of the provisions of Section 9 of the Act creating the Federal Trade Commission (Act of Sept. 26, 1914, c. 311, 38 Stat. 717), and of a certain investigation of the affairs of their concerns alleged to have been made by an agent for the Federal Trade Commission prior to their indictment and trial.

The Act creating the Federal Trade Commission (38 Stat. 717), after creating the Commission, defining its function to be the prevention of "unfair methods of competition in commerce," empowering it to conduct hearings in the discharge of that function, and authorizing it to investigate "the organization, business, conduct, practices, and management" of corporations engaged in commerce, contains in Section 9, 38 Stat. 717, 723, in the last paragraph thereof, the following language:

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in

obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

The facts by reason of which the petitioners claim the benefit of the immunity provision in Section 9 are the following:

A letter dated at Washington on June 30, 1922, signed "Federal Trade Commission. Otis. B. Johnson, Acting Secretary," addressed to "General Lee Development Interests, Edwards Building, Fort Worth, Texas," which letter appears on page 36 of the Record, requested that concern to furnish the information asked for in a schedule annexed to the letter. The Record does not clearly disclose what information was called for by this schedule. The schedule itself is not set out, although it may reasonably be inferred that the questions appearing on pages 60-65, inclusive, of the Record were contained in it.

Petitioner Charles Sherwin testified (R. 35, 36) that subsequent to the receipt by the General Lee Development Interests of the letter just referred to there appeared at the offices of that concern one John F. Southworth, who represented himself to be an agent of the Federal Trade Commission. Southworth presented petitioners with no evidence of his identity or authority other than his card. In addition to his card they later saw that "he carried a portfolio with letterheads and other documents with the Federal Trade Commission form." There is no further evidence whatever in the record concerning the connection, if any, of Southworth with the Federal Trade Commission excepting the testimony of one J. S. Swinson, a Post Office inspector, who said (R. 69, 70):

I know John F. Southworth. I met him last Fall. I did not talk to him about the General Lee matters. As near as I can get at it, his business is to procure information for the Federal Trades Commission of the United States Government. I think his title is Special Examiner, Federal Trades Commission.

In the whole record there is no evidence, other than the foregoing, that Southworth had any authority from the Federal Trade Commission to make any examination of the General Lee Development Interests or of the business of the petitioners, or that he ever made any report of any kind to that Commission touching any investigation he had made of

these petitioners or the common-law trusts they were promoting.

The further testimony was that after some discussion as to whether the Federal Trade Commission had jurisdiction of such concerns as the General Lee Development Interests the petitioners, according to their testimony, orally answered various questions asked them by Southworth. The substance of the information furnished is set out in the Record at pages 35-69, inclusive.

No subpoena was ever served upon either of the petitioners or any other person connected with their business.

Neither of the petitioners was ever sworn to give testimony nor was any other person sworn to give testimony in connection with their business, nor did any person testify except as petitioners answered questions put to them upon the visit or visits of Southworth. (R. 59.)

There was never a hearing of any kind except as the visits of Southworth might be characterized as a hearing. (R. 59.)

There was never any communication between Southworth or the Federal Trade Commission and the United States Attorney's office, which handled this case, or the Post Office Inspector, who procured the evidence; and none of those who were connected with the prosecution had any knowledge that Southworth or any representative of the Federal Trade Commission had ever investigated the

General Lee Development Interests. (R. 69-71, inclusive.)

There is nothing in the record to show that the petitioners disclosed to Southworth anything whatever that connected or tended to connect them with the crime whereof they were later accused and convicted. The petitioners themselves at no time testified that any of the particular correspondence upon which the indictment was based was shown by them to Southworth.

The District Court held that the facts did not entitle petitioners to immunity. On writ of error the case went to the Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the judgment of the District Court. The case is here on certiorari to the Circuit Court of Appeals.

ARGUMENT

It seems to us that the argument of this case can adequately be compassed within a few paragraphs, but we respectfully invite the court's attention to the arguments contained in the opinion of the District Court below (R. 82) and of the Circuit Court of Appeals below (R. 89). They clearly, cogently, and briefly summarize the reasoning in favor of the Government's position.

The immunity from prosecution provided by Section 9 is as "to any transaction * * * concerning which he [any natural person] may testify, or produce evidence, documentary or other-

wise, before the commission in obedience to a subpœna issued by it."

He who claims this immunity must show by the very terms of Section 9 (1) *that in obedience to a subpœna*, he has (2) *testified or produced evidence*, (3) concerning the *same transaction* for which it is sought to prosecute him. Absent any of these essentials he can not claim immunity. But none of them is present in this case.

I

There was no subpœna

There was no subpœna. No one other than a member of the Commission itself had authority to issue a subpœna. (Section 9, paragraph 1, 38 Stat. 722.) No agent of the Commission could issue a subpœna. The Secretary could not issue one. There is no suggestion of any subpœna ever having been issued for the petitioners or either of them or anyone else connected with them.

At the time this brief must go to the printer no brief has been served upon us by petitioners. However, in their brief filed in support of the application for *certiorari*, the contention appears (page 129 of brief in support of application for *certiorari*) that the letter set out on page 36 of the Record and to which no response was ever made was a subpœna. The contention is untenable under any recognized definition of the term.

II

Petitioners did not testify under oath

Not only was there never a subpœna in this case served upon petitioners, but petitioners never testified or produced evidence before the commission within the meaning of that language as employed in Section 9. Obviously formal testimony under oath is here meant. If that were not apparent from the language employed in the section proper, it becomes clear from the proviso "that no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying." This presumes formal testimony under oath. The immunity is only for him who has testified under oath. Congress did not intend that a person should at the same time obtain immunity and not be subject to the pains and penalties of perjury. In this case, however, there never was any testimony under oath; hence no such testimony as that which carried immunity with it.

III

Not the same transaction

The third essential is likewise absent from the case. The very general language used by petitioners as to the statements they made concerning their business to Southworth do not support the conclusion (necessary to their argument) that they revealed to him anything relative to the very misrepresentations upon which the indictment was based.

It will be noted that their testimony as to what they said to Southworth does not specifically refer to the letters charged in the indictment to have been sent through the mail. They showed him correspondence, but that they showed him this particular correspondence they do not say. In short, even if their informal statements to Southworth were "testimony" it was not, so far as the record discloses, testimony concerning that for which they have been prosecuted.

CONCLUSION

We respectfully submit that immunity can not be based upon disclosures which the record does not show concerned the transactions for which the petitioners were prosecuted, disclosures which were made to one whom the record does not show had any authority from the Federal Trade Commission to investigate, disclosures which were not made under oath nor as a part of testimony nor in obedience to a subpoena. To so greatly broaden the scope of the immunity provision obviously would give rise to innumerable abuses. It would open up an avenue of escape from just punishment that certainly would soon be crowded.

The judgment of the Circuit Court of Appeals should be affirmed.

JAMES M. BECK,
Solicitor General.

MERRILL E. OTIS,
Special Assistant to the Attorney General.

APRIL, 1925.